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No. 87-380

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
PETITIONERS,

v.

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED FOR REVIEW

A Medicare provider (*e.g.*, a hospital) must file a cost report with its fiscal intermediary at the end of each year. The fiscal intermediary audits the cost report and issues a Notice of Program Reimbursement (NPR) indicating the total amount of Medicare reimbursement due the provider for the year. A provider may appeal to the Provider Reimbursement Review Board if it is dissatisfied with the amount of reimbursement as indicated in its NPR. The Secretary of Health and Human Services ("Secretary") has interpreted the Medicare statute to require that, in order for a provider to challenge one of the Medicare regulations, the provider must claim costs expressly stated to be non-allowable under that regulation when filing its cost report.

The question presented for review, a to which the Courts of Appeal are in conflict, is:

Whether the Secretary's informal interpretation described above can be the basis for denying a provider access to the administrative and judicial process where: (1) the Medicare statute on its face does not impose such a requirement; (2) neither the statute nor the regulations provide notice that filing a cost report in compliance with the regulations operates as a waiver of any right to be heard and (3) the intermediary cannot invalidate the regulation in order to allow the costs?

A necessary subquestion is whether the courts' construction of the Medicare statute to deny a right to be heard under such circumstances is contrary to the presumption favoring judicial review as enunciated in *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667 (1986)?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioners Otis R. Bowen, M.D., Secretary of Health and Human Services and William Roper, Administrator, Health Care Financing Administration; and respondents Santa Rosa Hospital, Jackson County Hospital District d/b/a Jackson Hospital, Shands Teaching Hospital and Clinic, Inc., Mercy Hospital, Inc. and Abbey Health Services, Inc. d/b/a North Gables Hospital.

In addition to the respondents set forth above, the following Florida hospitals were also plaintiffs-appellees in the proceedings below: Tallahassee Memorial Regional Medical Center; Parkway Medical Center; Palm Beach Gardens Community Hospital; Clearwater Community Hospital; Amisub of Florida; Baptist Hospital of Miami; Bascom Palmer Eye Institute; Bethesda Memorial Hospital; Boca Raton Community Hospital; Broward General Medical Center; Cedars Medical Center; Doctors General Hospital; Doctors Hospital of Lake Worth; Florida Keys Memorial Hospital; Florida Medical Center; Highlands General Hospital; Holy Cross Hospital, Inc.; Imperial Point Medical Center; Jackson Memorial Hospital; James Archer Smith Hospital; Larkin General Hospital; North Broward Hospital; Palm Beach-Martin County Medical Center; Pembroke Pines General Hospital; Walker Memorial Hospital; Jay Hospital; Gadsden Memorial Hospital; and Doctor's Memorial Hospital.

The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondents are as follows: Santa Rosa Hospital's parent corporation is Health Trust Incorporated. Mercy Hospital, Inc. is sponsored by SSJ Mercy Health, Inc., which has four wholly-

owned subsidiaries including SSJ Properties, Inc., SSJ Medical Development, Inc., SSJ Home Health Services, Inc. and Mercy Hospital Foundation.

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ARGUMENT

Petitioner Otis R. Bowen, M.D., Secretary of Health and Human Services ("Secretary") correctly acknowledges that the "question presented in this case is the same as the question presented in *Bethesda Hospital Ass'n v. Bowen,* petition for cert. pending, No. 86-1764" and that he has "suggested that the Court should grant the petition for a writ of certiorari in *Bethesda Hospital Ass'n.*" (Pet. 8-10). However, rather than requesting the Court to accept his writ of certiorari and review the lower court's determination, the Secretary states only that the "petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of *Bethesda Hospital Ass'n v. Bowen,* petition for cert. pending No. 86-1764". (Pet. 10). On October 5, 1987, this Court granted the petition for a writ of certiorari in *Bethesda Hospital Ass'n v. Bowen,* 86-1764.

While the Secretary's pleading is titled Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, it is unclear whether he seeks

review of the lower court's judgment pursuant to his petition for a writ of certiorari or whether he is asking this Court merely to retain jurisdiction over this action, without granting the writ of certiorari, until final disposition of *Bethesda Hospital Ass'n,* including the Court's determination on the merits of that action. If the Secretary does not seek the grant of his petition for a writ of certiorari, then the Court should dismiss the Secretary's petition, as a result of which the lower court's judgment will become the law of the case.

If the Secretary does seek currently to invoke this Court's certiorari jurisdiction to obtain review of this action, then the respondent hospitals respectfully submit that if the Secretary's petition for a writ of certiorari in the case at bar should be granted, then the case should be consolidated with *Bethesda Hospital Ass'n v. Bowen.* If the Court were to hold this action in abeyance until final disposition of the merits of *Bethesda Hospital Ass'n v. Bowen,* the Secretary would obtain an unfair tactical advantage arising from the fact that the Court presently includes only eight members and the attendant possibility of a determination by an equally divided court.

In the action presently before the Court, respondent hospitals prevailed as to the issue which is the subject of the Secretary's petition for a writ of certiorari. In *Bethesda Hospital v. Secretary of Health and Human Services*, 810 F.2d 558 (6th Cir. 1987), *cert. granted sub nom. Bethesda Hospital Ass'n v. Bowen,* ____ U.S. ____ (October 5, 1987), the Secretary prevailed on the same jurisdictional issue which will be considered by this Court. This yields the possibility that if the two cases were considered together and members of this Court were to divide equally as to the disposition of both actions, the decisions of the lower courts would be affirmed and both the Secretary's and the respondent hospitals' victories would be preserved. *See United States v. Pink,* 315 U.S. 203, 216 (1942); *Hertz v. Woodman*, 218 U.S. 205, 212-14 (1910).

In the event that this action were held in abeyance pending final resolution of *Bethesda Hospital Ass'n,* and this Court were to be equally divided in *Bethedsa Hospital Ass'n*, it is far from certain whether the respondent hospitals would be reimbursed in accordance with the lower court's decision.

Accordingly, respondent hospitals respectfully submit that basic notions of fairness suggest that, should this Court grant the Secretary's petition for a writ of certiorari in this action, it should consolidate the action with *Bethesda Hospital Ass'n.* Inasmuch as the hospitals which are parties to this action and which are parties to *Bethesda Hospital Ass'n* are represented by the same legal counsel and precisely the same issues are raised, neither the Secretary nor this Court should be inconvenienced by the consolidation.[1]

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[1] A petition for certiorari is presently pending before this Court in *North Broward Hospital District v. Bowen,* 808 F.2d 1405 (11th Cir. 1987), petition for cert. pending, No. 86-1986. As stated by the lower court in this action, *North Broward* did not involve the same grant of judicial review as is in issue in the case at bar and in *Bethesda Hospital Ass'n. Tallahassee Memorial Regional Medical Center v. Bowen,* 815 F.2d 1435, 1457-58 and n.46 (11th Cir. 1987) (Pet. App. 44a-45a, 47a n.46). In addition, the *North Broward* case arises from a different set of facts, in that the hospital was not seeking to challenge a Medicare regulation. Accordingly, if the Court grants the writ of certiorari in *North Broward,* that action should not be consolidated with *Bethesda Hospital Ass'n.*

CONCLUSION

For the foregoing reasons, the Court should not hold this action further pending final disposition of *Bethesda Hospital Ass'n.* If the Court grants the Secretary's petition for a writ of certiorari, this action should be consolidated with *Bethesda Hospital Ass'n.*

Respecfully submitted,

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